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No. 83-602

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOHN BRIGGS, *et al.*,
Petitioners,

v.

GUY GOODWIN,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that this Court's decision in *Briscoe v. LaHue*, ____ U.S. ____, 103 S. Ct. 1108 (1983) resolved the issue of whether the doctrine of absolute witness immunity protected respondent, a Department of Justice attorney, from civil suit brought by former criminal defendants on the basis of alleged testimony given by respondent during a pretrial judicial proceeding.

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INTRODUCTION

This case involves a civil complaint in which petitioners seek both compensatory and punitive damages in a *Bivens*-type cause of action which, they claim, arises directly under the Constitution. Petitioners request a writ of certiorari to review a lower court opinion by which respondent's defense of witness immunity was upheld and summary judgment was accordingly granted in his favor.

The basis of the complaint reaches back to 1972, when petitioners were subpoenaed to appear before a federal grand jury in Tallahassee, Florida. The grand jury later indicted them on criminal conspiracy charges. They allege that respondent, an attorney with the Department of Justice, lied to a federal judge when he testified under oath that one of their fellow grand jury witnesses was not a government informer. They claim that this alleged perjury violated their sixth amendment right to effective assistance of counsel because it caused them to share various aspects of their defense with the informant. Petitioners were later acquitted in the criminal case and can identify no compensible injuries resulting from any actions of the respondent.

On March 7, 1983, while the case was pending in the Court of Appeals,[1] this Court, in *Briscoe v. LaHue*, ____ U.S. ____, 103 S. Ct. 1108 (1983) comprehensively examined the doctrine of witness immunity and concluded that government officials, including law enforcement personnel, are entitled to witness immunity in cases in which constitutional violations are alleged. In light of *Briscoe*, the Court of Appeals directed the parties to file supplemental memoranda on the appropriate disposition of

[1]The case has had a long and much litigated history. Numerous issues, including prosecutors' immunity and witness immunity, have been closely examined by the Court of Appeals in three separate opinions. In *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977) (hereinafter "Briggs I"), the Court of Appeals, on a Rule 12 motion, concluded Goodwin was not entitled to either prosecutorial or witness immunity. In *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983) (hereinafter "Briggs II"), the court reversed the District Court's summary judgment in favor of Goodwin, stating that certain material facts remain unresolved; and in *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983) (hereinafter "Briggs III"), the court, applying the doctrine of *Briscoe v. LaHue*, ____ U.S. ____, 103 S. Ct. 1108 (1983) affirmed the summary judgment grant.

this case. Thereafter, the Court of Appeals vacated its previous ruling and affirmed the summary judgment order of the District Court. Judge Bazelon stated

> *Briscoe* informs us that immunity is absolute for statements made on a witness stand. *Briscoe* therefore compels the conclusion that when Goodwin made his sworn statement from the witness stand, he enjoyed absolute immunity.

Briggs III, 712 F.2d at 1448 (footnote omitted).

Petitioners contend that significant differences between this case and *Briscoe* prohibit the application of the witness immunity doctrine. They request the writ of certiorari to review what they argue is an extension of witness immunity far beyond what this Court intended. (Petition, p. 34.) As we will show in this opposition, petitioners' argument is without merit. Their petition is based upon erroneous and unsubstantiated assertions of fact and law. The Court of Appeals correctly concluded that *Briscoe* applies fully to this case. Indeed, the circumstances of this litigation demonstrate the wisdom of the witness immunity rule.

An initial observation about petitioners' factual summary is necessary, for their presentation unjustifiably casts respondent in an unfavorable light. Statements are taken out of context and factual assertions without any basis in the evidence are repeatedly made by petitioners. The goal of this effort is to create the erroneous impression that Goodwin acted improperly in his role as a federal prosecutor, and perjured himself. Goodwin's role and his circumstances as a witness before the federal judge in Florida were carefully examined by the District Court judge who granted summary judgment. His opinion, based on the undisputed evidence, states explicitly that

> [the facts, as developed by discovery and the extensive record before the Court, establish that Goodwin in fact believed in the veracity of his statements.
>
> . . .
>
> It is clear that Goodwin did not perjure himself on July 13, 1972.

Petitioners' Appendix, pp. 44(a)-45(a).[2]

Petitioners' persistent and unremitting efforts to use the judicial processes against Goodwin confirms the wisdom of the rule announced in *Briscoe*. Disgruntled criminal defendants are among the most likely candidates to vindictively pursue prosecutors and other enforcement personnel who testify in the criminal cases. As the police officer in *Briscoe* was accorded immunity for his testimony, Goodwin likewise should be immune from civil prosecution.

STATEMENT OF FACTS

Petitioners allege that Goodwin and others[3] conspired to deny them their constitutional rights under the sixth

[2]The factors supporting the District Judge's findings include the following: (a) Goodwin issued strict instructions to the government informants that they not participate in the common defense; (b) the informants heeded this instruction; (c) Goodwin did not receive any information from the informant; (d) the plaintiffs' counsel at the July 12th hearing stated that they were not representing any informants. (Petitioners' Appendix 44(a)-45(a).

[3]In addition to Goodwin, plaintiffs sued three others: William H. Stafford, Jr. (then United States Attorney and now the Chief Judge for the Northern District of Florida), Stewart J. Carrouth (an Assistant United States Attorney) and Claude Meadow (a special agent of the Federal Bureau of Investigation). The District Court dismissed these three defendants, ruling that there was improper venue and insufficiency of process. This Court affirmed in *Briggs v. Stafford*, 444 U.S. 527 (1980)

amendment. The substance of the complaint is that in July 1972, Goodwin perjured himself while in Tallahassee, Florida, seeking indictments of named individuals. The petitioners were grand jury witnesses, some of whom were the object of grand jury indictments. Petitioners claim that Goodwin, while a witness in the judicial proceeding and having been placed under oath, falsely answered the following question put to him by the United States District Court Judge who was hearing motions relating to the grand jury proceedings:

> The Court: Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?
>
> The Witness [Guy Goodwin]: No, Your Honor.

This alleged perjury, the complaint asserted, enabled the government to "invade the defense camp" in violation of the sixth amendment.

Throughout the proceedings, the petitioners have claimed that Goodwin's one-word answer was perjury, and that this statement formed the crux of the constitutional violation. Though there is a decided shift in the claims now being made,[4] it is very clear that throughout the proceedings

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[4]Petitioners for the first time in the litigation have shifted their emphasis from Goodwin's witness status, and now contend that defendant Goodwin "violated petitioners' rights guaranteed by the Sixth Amendment not merely by his sworn statement in court but by his acts and omissions both before and after that statement was made." (Petition, p. 19). The problem with this analysis is that once Goodwin is removed from his witness status, he assumes the role of prosecutor, and is thus entitled to the absolute immunity accorded prosecutors, as articulated by the Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

below, Goodwin's status as a witness before the federal judge in Florida and his alleged "perjury" was the claimed constitutional tort. As noted above, the District Court Judge, upon full review of the undisputed evidence, concluded that the answer was not perjurious and that the summary judgment motion should be granted.

Despite the lengthy litigation of this case, the question of witness immunity was not fully considered until the Court of Appeals, in *Briggs III*, reviewed the issue in light of *Briscoe*. Upon an examination of the undisputed evidence, the Court of Appeals found that Goodwin, like the police officer in *Briscoe*, should be accorded the full protection provided by the witness immunity doctrine. As Judge Bazelon explained

> [w]e find it difficult to distinguish Goodwin's testimonial act from those of police officers in situations falling within the rationale of *Briscoe*. Testimony by a police officer will very often involve challenges to his conduct while performing investigatory tasks. A police officer who has been integrally involved in an investigation that culminates in a criminal prosecution has a clear interest in the outcome of the trial. In such a situation, the police officer has professional and personal interests in his testimony that are closely analogous to Goodwin's interest in the testimony out of which this suit arises. *Briggs I* explicitly found Goodwin to be operating not as a prosecutor but as an investigator. We decided that in that role his immunity should resemble that of a police officer involved in an investigation.

Briggs III, 712 F.2d at 1448 (footnote omitted).

The petition for certiorari fails to identify any meaningful distinction between Goodwin's circumstances and

those found in *Briscoe*. Goodwin was a witness when he made the statements upon which the complaint is based. The petitioners discount the record and suggest that Goodwin's status as a witness was unique and did not require immunity. But even the misleading factors identified below, in the petitioners' "Statement of the Case" (Petition, p. 5) do not support a departure from the rule stated in *Briscoe:*

1. The petitioners are in error when they state that *Briggs I* "considered the claims of both prosecutorial and witness immunity and . . . rejected both." (Petition p. 15). In fact, the issue of witness immunity was not factually developed or fully briefed when it was presented to the panel in *Briggs I*. The author of that opinion, Judge McGowan, acknowledged that he was writing "without the customary benefit of briefing and argument by the parties." *Briggs I*, 569 F.2d at 26. It is equally significant that Judge McGowan's opinion was written in the context of a motion to dismiss filed pursuant to Rule 12 of the Federal Rules of Civil Procedure and thus viewed the *allegations* in the light most favorable to the plaintiffs.[5] Despite these clear statements by Judge McGowan, the petitioners now suggest that the witness immunity issue was fully considered by the court.

2. Petitioners incorrectly rely upon two pages from Judge McGowan's opinion in *Briggs I* (Petition, pp. 16-17)

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[5]Judge McGowan was careful to note the procedural forces at work:

> Both the facts alleged in appellees' complaint and the procedural posture of this appeal are important to our decision of it. We take appellee's allegations to be true, as we are bound to do upon review of the District Court's pretrial disposition of a motion to dismiss. *Briggs I*, 569 F.2d at 13; *see also id.* at 21.

to support the assertion that "the [*Briggs I*] Court concluded that witness immunity doctrine did not encompass the circumstances of this case." (Petition, p. 15). Yet, as Judge McGowan was careful to note, his opinion was not written with any factual context, though the petition here suggests otherwise. It is significant that Judge Bazelon in *Briggs III* notes that the *Briggs I* opinion was written in entirely different factual circumstances:

> In *Briggs I*, the court did not consider of great significance the fact that Goodwin made his statement under oath from the witness stand:
>
> > Had [Goodwin] volunteered to represent as an officer of the court that no informers were involved, and had the parties been content with that, there would be no issue as to witness immunity worthy of the name. The difference between the falsity of such a nontestimonial representation, on the one hand, and the technical consequence of perjury attached to a statement under oath, on the other, is not at the heart of the immunity issue in this appeal.
>
> 569 F.2d at 26. Fuller briefing on this issue indicates that the fact of Goodwin's oath was indeed significant to the credibility given his statement by those who relied on it. The full transcript makes clear that Goodwin offered to make an unsworn representation in response to the court's inquiry, but witnesses' counsel insisted that such a representation was "not competent proof in any court of law and that under these circumstances Mr. Goodwin ought to submit an affidavit *under oath* . . . ." . . . It was in response to this objection that the court ordered Goodwin to take the stand, be sworn, and testify. Moreover, testimony at appellant's criminal trial, and depositions and interrogatories suggest the importance of the fact that Goodwin's statement was under oath.

712 F.2d at 1448, n.27.

3. Petitioners assert that the Court of Appeals in *Briggs I* "expressed doubt whether witness immunity principles were in any event applicable to *Bivens*-type actions alleging claims of constitutional violation." (Petition, p. 17) This is accurate as far as it goes. However, Judge McGowan's opinion was clearly the minority view.[6] More significantly, this is precisely the issue laid to rest in *Briscoe*. Witness immunity *is* appropriate in cases where there are claims of constitutional violations.

4. The petitioners create confusion when they rely on footnote 36 of the *Briggs III* opinion for the proposition that the Court of Appeals was expressing doubts about the wisdom of *Briscoe*. As Judge MacKinnon states in his concurrence in *Briggs III:*

> I must also voice my disagreement with the view expressed in footnote 36 of the majority opinion. That view fails to acknowledge a basic principle of law that has been recognized as fundamental to American jurisprudence for over a hundred years: that those who participate in public litigation and who perform certain governmental functions are not to be subjected thereby to harassing civil litigation. . . . My final objection to the personal comments in footnote 36 is that they are extrajudicial and serve no worthwhile purpose, as the Supreme Court has spoken.

712 F.2d at 1450.

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[6]Indeed, this Court in *Briscoe* identified the minority status of Judge McGowan's opinion when it juxtaposed the *Briggs I* opinion with those of the "majority of Courts of Appeal". *Briscoe*, 103 S. Ct. at 1112, n.4.

I. REASONS FOR DENYING THE WRIT

The Court of Appeals Correctly Concluded That At The Time That Respondent Committed The Alleged Wrongful Acts, He Was A Witness In A Judicial Proceeding And Thus Entitled To The Protection From Suit Provided By The Doctrine Of Witness Immunity, As Announced By This Court In *Briscoe v. Lahue*

Briscoe held that the public policy is best served if a witness is not put in apprehension of a claim for damages based on the witness' testimony. It thus affirmed the "common law's protection for witnesses." *Briscoe,* 103 S. Ct. at 1115. The truth finding process, the Court observed, is better served if the witness, like other participants in judicial proceedings, can testify and perform his function without fear of potential civil liability. Accordingly, the Court adopted a rule of witness immunity that is as broad and absolute as the immunity accorded judges and prosecutors.

> The principles set forth in *Pierson v. Ray* to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just — or possibly unjust — conclusion is equally indispensible.

Id. at 1121.

Briscoe also lays to rest any doubts about the application of the doctrine of witness immunity to cases in which constitutional violations are alleged. The Court explicitly rejected any limitation on either the application of the witness immunity doctrine in claims of constitutional wrongs or the immunity to be accorded law enforcement personnel. The opinion clearly identifies the scope of

witness immunity as a matter of "federal law" and resolves those disputed areas of law addressed by Judge McGowan in the majority opinion in *Briggs I.*[7]

Briscoe stands for the proposition that witness immunity must be absolute if the goals of judicial proceedings are to be attained. The Court recognized and adopted "the common law [view which] provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process." *Briscoe,* 103 S. Ct. at 1116.

Briscoe applies fully to the facts and circumstances of this case. Respondent was a witness when the testimony giving rise to this action was given.[8] As the transcript of the July 13, 1972 session shows, Goodwin was directed to take the witness stand and was sworn by the clerk because the petitioners' counsel were not satisfied with Goodwin's unsworn statements that their clients were not government informants. The federal judge in Tallahassee, Florida, in-

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[7]In Section III of *Briscoe,* the Court examined the legislative history and the statutory language of various features of the Civil Rights Act and concluded that nothing therein "tend[ed] to show that Congress intended to abrogate witness immunity in civil actions under § 1, which applied to wrongs committed 'under color of law.'" *Briscoe,* Ct. at 1118. Thus the Court's opinion necessarily was concerned with the traditional witness immunity doctrine.

[8]In responding to petitioners' claim that he was not a witness, the respondent is not suggesting that witness immunity is the only protection from civil suit available to him. Respondent has previously argued that he was also protected by the immunity afforded prosecutors under *Imbler v. Pachtman,* 424 U.S. 409. Indeed, it was on the basis of a qualified immunity doctrine for prosecutors that the District Court entered its order dismissing petitioners' claim. Respondent does not agree with the Court of Appeals' decision denying him absolute prosecutorial immunity, but is limiting his reponse here to the issue raised by petitioners.

vited cross examination if counsel had information contrary to Goodwin's testimony. When that was not forthcoming, Goodwin was excused as a witness. The District Court judge clearly viewed Goodwin as a witness. Petitioners have continuously recognized Goodwin as a witness, as their depositions and answers to interrogatories demonstrate.

Petitioners further claim that *Briscoe* dces not apply because Goodwin is an attorney, not a police officer (Petition, p. 27). This is an obvious misreading of *Briscoe,* which does not create a special witness immunity for police officers, but rather declined to create a special exception to an already existing witness immunity for law enforcement personnel testifying in an official capacity. In making this claimed distinction, petitioners underscore their misunderstanding of *Briscoe.* Goodwin's immunity stems not from his role as a prosecutor but from his role as a witness.

Petitioners further attempt to distinguish this case by arguing that Goodwin's special circumstances should not permit the application of the witness immunity doctrine. They contend that the policy considerations underlying the immunity of police officers and prosecutors do not apply because of the unusual factual situation found here. They suggest that unlike police officers who testify in "scores of cases" each year, a prosecutor in Goodwin's situation does not need the protection of witness immunity (Petition, p. 30). This argument loses sight of why immunity doctrines have been employed. Immunity should not turn on how often a person might be exposed to problems, but rather on the nature of his or her circumstances. *See, e.g., Stump v. Sparkman,* 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachman,* 424 U.S. 409 (1976) (prosecutorial im-

munity); *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (attorneys' immunity); *Briscoe v. LaHue, supra* (witness immunity). One or two suits for damages against prosecutors who testify will create the very chilling effect that initially gave rise to the need for immunity. The frequency of the occurrence does not establish the nature of a witness' protection.

CONCLUSION

This Court's decision in *Briscoe v. LaHue* clearly covers the facts of this case, and that decision was correctly applied by the Court of Appeals. The policy considerations of *Briscoe* and related cases compel the conclusion that the respondent is entitled to absolute witness immunity. That conclusion by the Court of Appeals should not now be disturbed. The writ should be denied.

Respectfully submitted,

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